CHIN KOK KWONG CONSTRUCTION SDN. BHD.

v.

SUNRISE TOWERS SDN. BHD.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 187 OF 1982]
18 MAY 1984

CIVIL PROCEDURE: *Application for leave to amend statement of claim - Whether suit instituted with authority - Company ordered to be wound-up - Order stayed until further order - Cause of action - Whether arose from same or substantially same facts - Claim for return of deposit - Claim for works carried out.*

The plaintiffs commenced action on 7 April 1982 against the defendants for the return of a sum of money paid as deposit under a sale and purchase agreement entered into between the plaintiffs as purchasers and the defendants as vendors, for the purchase of an apartment. The suit was instituted by their solicitors. The plaintiffs applied to amend the indorsement of their claim and statement of claim by adding a new cause of action, specifically, to add a new prayer for the recovery of a sum of money allegedly due and payable to the plaintiffs by the defendants under a building contract. A winding-up order had been made against the plaintiff on 7 November 1977 but had been ordered, on 2 March 1981, to be stayed until further order.

Held:

[1] The suit was instituted without authority and must be dismissed with costs. A solicitor's authority to act may be questioned at any stage of proceedings and even at the conclusion of the trial.

[2] The application for leave to amend was as a consequence struck out.

[3] Even if the suit had been properly instituted, the Court would not have been disposed to grant leave. Amendment under O. 20 r. 5(5) Rules of the High Court, 1980, is subject to the proviso that the new cause of action arises from the same or substantially the same facts. In the circumstances of the case, it could not be said that the new cause of action arose out of the same facts or substantially the same facts as the cause for the return of the deposit.

[4] The directors must bear the costs personally, as the suit was instituted by solicitors on behalf of a company without authority.

Cases referred to:
Simmons v. Liberal Opinion Ltd. [1911] 1 KB 966
Looi Guan Kway v. Low Lean Book & 4 Ors. [1938] MLJ 35
Grant Advertising International Inc. & Anor. v. Glaze [1968] 1 MLJ 31
Re L.Y. Swee & Co. Ltd [1968] 2 MLJ 104

Legislation referred to:
Rules of the High Court 1980, O. 20 r. 5(5)

For the plaintiffs - Dulip Singh; M/s. Dulip Singh & Co.
For the defendants - Lee Kok Liang; M/s. Lee Kok Liang & Co.

JUDGMENT

Edgar Joseph Jr J:

By a writ of summons issued on 7 April 1982, the plaintiffs herein are praying for the return of a sum of RM39,300 from the defendants being deposit paid under a sale and purchase agreement dated 2 October 1975, entered into between the plaintiffs as purchasers and the defendants as vendors, for the purchase of an apartment.

The plaintiffs now wish to amend the indorsement of their claim and statement of claim by adding a new cause of action against the defendants. Specifically, they wish to add a new prayer for the recovery of a sum of RM29,936.71 being money allegedly due and payable by the defendants to the plaintiffs under a building contract dated 16 March 1977 for work done by the plaintiffs as contractor for the defendants, as employer, inclusive of attendances and profits due to the plaintiffs, certified by the defendants' architects as due and payable by their letter dated 6 June 1977.

It is not disputed that a winding-up order was made against the plaintiff company by Arulanandom J on 7 November 1977. However, on 2 March 1981, it was ordered by Arulanandom J by consent, that that order be stayed until further order. It was further ordered that the plaintiff company be at liberty to carry on business upon terms and resolutions approved by the creditors' meeting held on 28 June 1980. It was also ordered, *inter alia*, that the Official Receiver or his solicitors do forthwith demand and/or recover by all lawful means all moneys due from all debtors of the company and upon recovery of same and after deduction of costs, the balance be deposited with the Official Receiver or his solicitors for distribution to the various creditors of the plaintiffs.

Mr. Dulip Singh, for the plaintiffs, upon being queried as to his authority to institute the suit herein, said that he acted on the authority of the Official Assignee in writing. A perusal of that writing however shows that the Official Receiver by a letter dated 25 October 1981 (Encl: 20 in Companies Winding Up No. 5/77 Pt. III/30) merely said that he had no objection to Messrs: Dulip Singh & Co. taking Court action against the debtors owing money to the company before the winding-up order dated 7 November 1977 adding, that in such event, they would be acting, not on behalf of the Official Receiver, but on behalf of the plaintiffs who would be liable as regards all costs and expenses. In any event, this letter can in no way abrogate or even modify the order of Arulanandom J dated 2 March 1981 enabling only the Official Receiver or his solicitors to recover all moneys due from all debtors of the company. A solicitor's authority to act may be questioned at any stage of the proceedings and even at the conclusion of the trial: see *Simmons v. Liberal Opinion Ltd.* [1911] 1 KB 966. In these circumstances, I am quite satisfied that this suit was instituted without authority and it is accordingly dismissed with costs. The application for leave to amend is, in consequence, struck out.

I might add that even if this suit had been properly instituted I would not have been disposed to granting leave to amend because, although O. 20 r. 5(5) of the Rules of the High Court, 1980, provides that an amendment may be allowed under para. (2) notwithstanding that the effect of the amendment will be to add a new cause of action this is subject to the all-important proviso that the new cause of action arises out of the same facts, or substantially the same facts, as the cause of action in respect of which relief had already been claimed in the action by the party applying for leave to make the amendment.

I am satisfied that in this case the claim for return of the deposit arises under a sale and purchase agreement dated 2 October 1975 which the parties had agreed to rescind on 9 March 1977, whereas the claim for works carried out arises from an agreement in writing dated 16 March 1977 entered into by the plaintiffs as contractor and defendants as employer. I fail to see how in the circumstances it could be said that the new cause of action arises out of the same facts or substantially the same facts as the cause of action for the return of the deposit for the purchase of the apartment in respect of which relief had already been claimed in the writ and statement of claim. To allow such an amendment would turn a suit of one character into a suit of another and inconsistent character. Manifestly, this is not permissible. It is not difficult to cite an anthology of cases for this proposition but I need only refer to *Looi Guan Kway v. Low Lean Book & 4 Ors.* [1938] MLJ 35, applied in *Grant Advertising International Inc. & Anor. v. Glaze* [1968] 1 MLJ 31.

It remains for me to consider the question of costs. Where a suit is instituted by solicitors on behalf of a company without authority there is authority for saying that its directors must bear the costs personally: (*Re L.Y. Swee & Co. Ltd.* [1968] 2 MLJ 104, 107), and I so order.

Also found at [1984] 2 CLJ 232